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# Massachusetts Law Quarterly

## OCTOBER-DECEMBER, 1940

(LAST NUMBER OF VOLUME XXV. KEEP COVERS ON EACH NUMBER WHEN BINDING AS THEY PROVIDE THE INDEX AND SEPARATE THE NUMBERS CONVENIENTLY.)

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Issued Quarterly by the
MASSACHUSETTS BAR ASSOCIATION, 60 State St., Boston, Mass.

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS OF AUGUST 24, 1912,
Of MASSACHUSETTS LAW QUARTERLY, published quarterly at Boston, Mass., for October 1, 1940

State of Massachusetts } ss.
County of Suffolk }

Before me, a Notary Public in and for the State and county aforesaid, personally appeared Frank W. Grinnell, who, having been duly sworn according to law, deposes and says that he is the Managing Editor of the MASSACHUSETTS LAW QUARTERLY, and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management, etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, embodied in section 411, Postal Laws and Regulations, printed on the reverse of this form, to wit:

1. That the names and addresses of the publisher, editor, managing editor, and business managers are: *Publisher*, Massachusetts Bar Association, 60 State St., Boston, Mass.; *Editor*, Frank W. Grinnell, 60 State St., Boston, Mass.; *Managing Editor*, the same; *Business Manager*, the same.

2. That the owner is: Massachusetts Bar Association—*President*, Joseph Wiggin; *Treasurer*, Horace E. Allen; *Secretary*, Frank W. Grinnell.

3. That the known bondholders, mortgagees, and other security holders owning or holding 1 per cent or more of total amount of bonds, mortgages, or other securities are: None—There are no bonds, mortgages or other securities.

4. That the two paragraphs next above, giving the names of the owners, stockholders, and security holders, if any, contain not only the list of stockholders and security holders as they appear upon the books of the company but also, in cases where the stockholder or security holder appears upon the books of the company as trustee or in any other fiduciary relation, the name of the person or corporation for whom such trustee is acting, is given; also that the said two paragraphs contain statements embracing affiant's full knowledge and belief as to the circumstances and conditions under which stockholders and security holders who do not appear upon the books of the company as trustees, hold stock and securities in a capacity other than that of a bona fide owner; and this affiant has no reason to believe that any other person, association, or corporation has any interest direct or indirect in the said stock, bonds, or other securities than as so stated by him.

5. That the average number of copies of each issue of this publication sold or distributed, through the mails or otherwise, to paid subscribers during the 12 months preceding the date shown above is ..... (This information is required from daily publications only.)

FRANK W. GRINNELL.

Sworn to and subscribed before me this 25th day of September, 1940.

RICHARD G. DOBE, *Notary Public.*

[SEAL] (My commission expires March 27, 1947.)

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*Entered as Second-Class Matter at the Post Office at Boston.*

## ANSWER TO ANTICIPATED QUESTIONS

As to the numbers in this Volume XXV of the "QUARTERLY," the first number was the "Preliminary Supplement" for January–March 1940. The subsequent numbering is explained in the "QUARTERLY" for April–June, 1940 (inside front cover). F. W. G.

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## REGIONAL CONFERENCE OF OFFICERS OF STATE AND LOCAL BAR ASSOCIATIONS IN NEW ENGLAND AND NEW YORK

The American Bar Association has called a conference of the Presidents and Secretaries of state and local bar associations of the First and Second Federal Circuits in Boston, on January 15th.

Jacob M. Lashly of St. Louis, President of the American Bar Association; Arthur T. Vanderbilt of New Jersey, former president, chairman of the Executive Committee of the National Conference of Judicial Counsels, and a member of the Committee on Judicial Administration; Edmund Beckwith of New York, Chairman of the Committee on National Defense, and Joseph Gaffney of Philadelphia, chairman of the Committee on American Citizenship, will be present to take part in the conference. Other members of these Committees, members of the Board of Governors and members of the House of Delegates of the American Bar Association from the seven states in the Circuits, have been invited to the conference.

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## THE BILL OF RIGHTS REVIEW

Chicago, Ill.,
December 2, 1940.

JOSEPH WIGGIN, Esq., Pres.,
Massachusetts Bar Association,
27 State Street,
Boston, Massachusetts.

*Dear Sir:*

The American Bar Association's Committee on the Bill of Rights now publishes a Bill of Rights Review. This publication is designed to be issued quarterly. It is a special "Law Review" of the type issued by many law schools. It contains articles, editorials, and case notes on Bill of Rights matters only; it also contains material of an extremely valuable nature for every lawyer in the United States, and is of especial value to those who are members of a committee on the Bill of Rights and those whose practice runs into such field of law.

In order to effect the work of our Committee, and disseminate work of an educational character, we are desirous of having our Review reach every lawyer in the land. Since our funds are limited, we find it necessary to seek subscriptions. The annual rate for the Review is $1.00. Will you please bring this matter to the attention of the members of your Bar Association?

Inquiries concerning this publication may be addressed to the offices of the Bill of Rights Review, 31 Nassau Street, New York City.

GEO. I. HAIGHT,

*Chairman of the American Bar Association*
*Committee on the Bill of Rights.*

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## COURTROOM SCENES IN THE "MOVIES"

*Editor Massachusctts Law Quarterly:*

I have attended a good many movies this last Spring and Summer. Nearly every one has included a courtroom scene, which has usually shown the procedure very differently from the way it actually goes on in court. I have seen everything from a citation of a non-existent Massachusetts criminal code to free-for-all disputes participated in by judge, counsel, parties and witnesses. Probably you have had somewhat the same experiences.

Either the vogue of showing courtroom scenes in the movies is on the increase, or I have had the luck to see this kind of picture lately. If the former is the case, it is a serious question in my mind whether some sort of organized protest should not be made through the American Bar Association or the National Association of Judicial Councils. It seems to me the great movie-going public is getting a very false idea of the way justice is administered in courtrooms.

A year or two ago I saw some comment in one of the law journals along this same line. This note suggested that since the studios often spend many thousands of dollars on a single picture the retaining of an $1800 law clerk on their staffs would keep them out of many errors when their pictures are concerned with the administration of the law.

Very truly yours,

HOWARD L. STEBBINS

*Librarian Social Law Library*

## A FALL RIVER POLICE ORDER

September 25, 1940.

*To the Secretary of the Massachusetts Bar Association:*

The Fall River Board of Police has adopted the following rule at the request of the Judiciary Committee of the Fall River Bar Association:

"No Police Officer shall suggest or recommend to any person, directly or indirectly, the retainer or employment of any designated attorney-at-law in relation to any proceedings, cause or issue arising out of a case, investigation or complaint in which such officer has had any official connection."

Complaints have been frequent throughout the Commonwealth that police officers have too often acted as feeders for certain lawyers in procuring their services in cases arising in the District and higher courts, nor is the practice confined solely to city and town police, but has permeated to certain state departments. Not only has it been proved to be a discrimination against ethical lawyers but has set a bad example for the young practitioners.

It is suggested that the Massachusetts Bar Association give consideration to this growing custom and take such action as may effectually deal with the situation.

Very truly yours,

ARTHUR E. SEAGRAVE
*President Fall River Bar Association*

NOTE:—In the newspaper containing the announcement of the order appeared also the following statement:

> "Members of the Board adopting the Bar Association's request and issuing it as a general order declared that complaints of this nature have been received in the past and that in the future, any member of the Police Department violating the order will be brought up on charges.
>
> "We do not intend to try to curb the rights of any member of the Police Department as a citizen," Chairman Lawson pointed out, "but the common practice of certain members of the department in recommending certain attorneys to the public, especially in cases where the department member is officially connected, must stop."

## FORECLOSURES UNDER THE SOLDIERS AND SAILORS ACT

*The discussion at the Meeting of the Massachusetts Conveyancers' Association*

(*From the "Bar Bulletin"*)

The bar is puzzled about making, not only a good, but a marketable, title under foreclosure. At the recent meeting of the Massachusetts Conveyancers' Association the evening was devoted to the subject and many views were expressed. In one city the active conveyancers have agreed to investigate carefully to ascertain whether there is a soldier or sailor interested and then rely on an affidavit that there is not. That was common under the 1918 act. Men from other counties asked, "How can we pass such a title?" Another man suggested that unless the mortgagee intends to put more money into the property than his mortgage covers, he is practically safe in many cases if he makes an entry, buys in the property at the foreclosure sale, spends no more on repairs, etc., than will bring up the total to the amount of his mortgage, and then relies on the fact that any one in the service, if he exists, will have to pay the full amount of the mortgage in order to redeem. Others called attention to the fact that the act of Congress called for an order of court authorizing sale before the sale (but not before the notice of sale), like the order in the *John Hancock Insurance Co.* case in 232 Mass., and suggested that the only safe course was a bill in equity (of which the Land Court has jurisdiction) for such an order, but that such procedure would delay a sale for some time, even where there was no one known to be in the service. The Land Court judges are ready to cooperate in every fair way, but no way of shortening the time for service and answer in equity, or of reducing the serious expense of service and publication, has yet been discovered. Suggested rules of court under G. L. c. 240, § 27 have not yet seemed practicable. The question was raised whether the order in the *John Hancock* case operates as a judgment *in rem* against unknown persons. Sections 6 to 9 of chapter 240 (the Nathan Matthews Act) provides for a bill to remove a cloud which provides a judgment *in rem* after publication, etc., as specified, but that proceeding would also be slow and expensive. Emergency legislation to provide a special procedure to meet the

situation under the Act of Congress fairly and promptly has been suggested and is under consideration by members of the Massachusetts Conveyancers' Association.

Meanwhile it should be remembered that the Act of Congress does not affect an entry to foreclose, although the mortgagee has to wait three years for it to become absolute and also that opinions under the 1918 Act cited in this number of the "Quarterly" show that a sale under a power without an order of court is not absolutely void, but that the Soldiers and Sailors Act is a special circumstance which is sufficient to give the equity courts of the Commonwealth jurisdiction to foreclose and also to allow a person in service to redeem in equity provided he comes into equity with clean hands and is able to redeem. It is said that owners of equities are conveying them to sons or relatives or others in the service in order to block foreclosures. The Act of Congress was not passed to allow that. The restrictions on foreclosure "apply only to obligations originating prior to the date of approval of this act and secured by mortgage, etc. . . . upon real or personal property owned by a person in military service at the commencement of the period of . . . service and still so owned by him." We do not believe that such transfers, or acceptance of such transfers, for the sole purpose of blocking foreclosures would be considered by a court of equity as a defense to an order or as a ground for redemption. The purpose of the act is to protect soldiers and sailors, not to provide a smoke screen for others. It was suggested at the Conveyancers' meeting that it was not the purpose of the federal act to interfere with the state recording system or the rights of mortgagees any more than is necessary to give protection to service men and that a part of the "circumstance" of the federal act to be considered by courts of equity as a legal and reasonable condition of the protection to service men is the provision that the act may be enforced "through usual forms of proceeding" of the courts or "*under such regulations as may be by them prescribed.*" These words seem to contemplate any reasonable rules, but none have yet been adopted because of uncertainty.

## MEMORANDUM OF CASES AS TO FORECLOSURES UNDER THE SOLDIERS AND SAILORS ACT OF 1918

*(From the "Bar Bulletin")*

Bill in equity by a soldier against mortgagee who had foreclosed without observing the act. The soldier was not the record owner but claimed to be an equitable owner and was given relief. *Hoffman* v. *Charlestown Five Cents Savings Bank,* 231 Mass. 324.

A mortgagee who has foreclosed without observing the act may force a purchaser to take title if he can prove to the satisfaction of the court that no one in military service had any interest in the property. An affidavit to that effect in the affidavit of sale is not enough. *Morse* v. *Stober,* 233 Mass. 223.

Mortgagee may bring a bill in equity and get a decree authorizing for a sale without the intervention of a commissioner substantially in accordance with the power of sale in the mortgage and without further notice than that required by the power, unless in the opinion of the court it is deemed necessary or advisable to provide for additional notice or for an extension of the time required for notice of sale. The form of order by the Supreme Judicial Court authorizing foreclosure should be examined and the opinion studied. (The Land Court has jurisdiction in equity under St. 1934, C. 67, and see G. L., C. 185, § 25.) *John Hancock Mutual Life Insurance Co.* v. *Lester,* 234 Mass. 559.

Where a mortgage given before the act was kept alive as additional security for one given after the act, foreclosure of the earlier one upon a default in the later one was not contrary to the act as the "obligation" arose after the act. *Kendall* v. *Bolster,* 239 Mass. 152.

On a bill in equity to authorize foreclosure it was held that the person who gave the mortgage had title to do so and her soldier sons were not owners and therefore decree authorizing foreclosure was affirmed. *Great Barrington Sav. Bank* v. *Brown,* 239 Mass. 546.

The Land Court will register title following a foreclosure by entry to which the act had no application. *Bell v. Buffington,* 244 Mass. 294.

The act does not prevent or make invalid a sale when the soldier knows of it and makes no objection or expressly assents to it. *Church* v. *Brown,* 247 Mass. 282.

December 24, 1940.

Secretary, Massachusetts Bar Association.

*Dear Sir:*

The Judiciary Committee of the Fall River Bar Association in cooperation with resident conveyancers has recommended that a petition be filed with the legislature to meet the emergency created by the Soldiers and Sailors Civil Relief Act of 1940. This statute relates to the foreclosure of real estate mortgages under powers of sale.

The Committee has reported that, after considering decisions of the Massachusetts Supreme Judicial Court under a similar Act passed by Congress 1918, in which the language is the same as the Act of 1940, "a good record title" would not result by virtue of the foreclosure of mortgages under a power of sale, where such sale took place after August 27, 1940 and was based upon an obligation "originating" prior to October 17, 1940 unless an order of a Court of Equity was first obtained. It is felt that it would be improper to take title to real estate under such a foreclosure sale unless such an order was obtained.

To help those localities in the Commonwealth not in close proximity to Boston, the Committee recommended that Equity Jurisdiction be given to the District Courts for the purpose of issuing orders as required under the Act of Congress. Such a procedure will relieve the Land Court from what is likely to be a burdensome task and would seem to be of general benefit.

Yours very truly,

ARTHUR E. SEAGRAVE,
*President, Fall River Bar Association.*

## MEMORANDUM AS TO FEDERAL JURISDICTION OF STATE COURTS

In the recent advisory opinions of the Justices of October 18th, 1940, (A. S.) as to Superior Court judges and the draft boards, they cite the following cases bearing on the power of the United States "to confer jurisdiction upon courts of this Commonwealth or to impose duties upon the judges thereof"—

(See *County of Hampden* v. *Morris*, 207 Mass. 167, 169;
*County of Berkshire* v. *Cande*, 222 Mass. 87;
*Keegan* v. *Director General of Railroads*, 243 Mass. 96, 99;

*Goulis* v. *Third District Court of Eastern Middlesex*, 246 Mass. 1, 6–7).

In the *Keegan* case, Rugg, C. J., said:

> "It may be assumed that no act of Congress . . . can enlarge, restrict or regulate the jurisdiction of state courts, although it may provide that certain new actions within the scope of federal power may be brought under existing jurisdiction already conferred by state laws. *Second Employers Liability cases*, 223 U. S. 1, 56–58".

In that opinion the Supreme Court of the United States discusses the matter quite fully.

These opinions seem to show that the clause in the Soldiers and Sailors Act, Section 102 (1) authorizing the courts to proceed "under such regulations as may be by them prescribed" as an alternative to usual procedure is one of the conditions of the protection to service men provided, and that local courts having equity jurisdiction may make reasonable rules to carry out the act in case the legislature does not act promptly to meet the emergency calling for a simple, fair and prompt inexpensive procedure.

Cf. *Tarbell's Case*, 13 Wall, 397; *Clark* v. *Mechanics, Etc.*, B. & K. 282; *Stewart* v. *Kahn*, 11 Wall, 493; *Ebert* v. *Poston*, 266 U. S. 548; *California State Bar Journal*, December 1940.

F. W. G.

## DILATORY JUSTICE

The Secretary has received the following letter from a member of the bar:

*Dear Sir:*

I submit for consideration a tentative draft of an act to discourage dilatory decisions following a suggestion of a justice of the Superior Court.

A bill, designated as Senate Bill No. 222, submitted by the Lynn Taxpayers' Association to the Legislature in 1939, provided for an amendment to Section 1 of Chapter 206 of the Acts of 1936. This bill contained several objectionable features as well as commendable ones, and did not pass, apparently because of the defects rather than the merits. The Act of 1936 dealing with this subject was an entering wedge but has no teeth, and is in want of amendment for this reason. It may be observed that the troublesome question of infraction of constitutional rights by subtraction of part of the dilatory justice's salary is obviated by merely *deferring* payment of salary during the judge's delay.

The first paragraph of Senate Bill No. 222 of 1939 has been substantially embodied in the form herewith submitted. The last paragraph of that bill (Senate 222) would prevent the dilatory justice from continuing to sit and debar him from ever receiving such portion of his salary as was payable during the period of delay. These features are distinctly objectionable, and the substitute provisions in the present form will overcome the former objections. I might add, in this connection, that in two jury cases tried together in 1936 at Brockton before a Justice of the Superior Court, motions for new trial were promptly filed in each case and fully argued, but the decision of the justice on both motions was deferred for fully four years. The justice in question observed to counsel after the lapse of over three years that he thought there ought to be some legislation or rule of court compelling justices to make decisions with reasonable promptness, and admitted his delinquency in those cases. Apparently, he felt the need of pressure on the judiciary which the statute of 1936 was designed, but failed, to obviate.

With the letter was submitted the following:

## DRAFT OF AN ACT TO DISCOURAGE BELATED DECISIONS BY JUSTICES OF THE SUPERIOR COURT AND OF DISTRICT COURTS.

SECTION 1. Section 14A of Chapter two hundred and twenty of the General Laws is hereby amended to read as follows:—

SECTION 14A. An associate Justice of the Superior Court, who has reserved his decision in a case heard by him without a jury, or in any matter or proceeding therein or in a case heard by him with a jury, shall be deemed dilatory if he does not render his decision within four months after the earliest date when such decision might have been rendered, or within such further time, not exceeding two months, except by reason of prolonged sickness or involuntary absence of such justice, as the chief justice of said court may grant for satisfactory cause shown upon a request in writing by such justice made within said period of four months, containing a statement of his reasons for not having rendered his decision and for requesting an extension of time for rendering his decision. A justice or special justice of a district court, other than the municipal court of the city of Boston, who has reserved his decision in a case heard by him, or in any matter or proceeding therein, shall be deemed dilatory if he does not render his decision within a like period, or within such further time as hereinbefore provided as a justice, other than the trial justice, of the appellate division of the court in which the case was heard may grant upon a like request in writing, made by such justice or special justice within said period of four months. An associate or special justice of the municipal court of the city of Boston, who has reserved his decision in a case heard by him, or in any matter or proceeding therein, shall be deemed dilatory if he does not render his decision within a like period, or within such further time as hereinbefore provided, as the chief justice of said court may grant, upon a like request in writing, made by such associate or special justice within said period of four months.

On the first Monday of each month a list of cases a decision or finding in which, or in any matter or proceeding therein, has not been filed as hereinbefore specified, together with the name or names of the *dilatory* justices, shall be conspicuously posted in the judges' lobby by the clerk of the Court whereof such justice is a member, and a copy thereof shall be forthwith given by him to every such justice and to the state comptroller or to the county treasurer, as the case may be. A justice of the superior court, a district court, or the municipal court of the city of Boston, deemed *dilatory* as aforesaid, shall not be paid any portion of the salary or compensation which he would otherwise be entitled to receive, during the period of his *delay*, and the clerk of the court shall give prompt notice to the state comptroller or to the county treasurer, as the case may be, of the termination of every such *delay*, and shall also promptly remove from said list the name of each justice whose *delay* has terminated.

SECTION 2. This act shall become operative on the first day of September of the current year.

[Note:—Discussion is invited.]

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The present statute, G. L. (Ter. Ed.) Chap. 220, § 14A, was inserted by St. 1936, Chap. 206, when there were 136 cases in the District Courts undecided after 60 days, as reported by the cir-

cular letter of the Administrative Committee of the District Courts of January 10th, 1936. How many there were in the Superior Court, we do not know, but the criticism was current and emphatic in conversation, as we remember it. The situation has improved somewhat, but the frank suggestion of the Superior Court judge suggests the real importance of the problem. Delays in the Supreme Judicial Court are a matter of comment also, but the Supreme Judicial Court is a constitutional court, to which the suggestions do not apply, and which presents a somewhat different problem involving, perhaps, constitutional questions as to legislative mandates or pressure. The other courts, however, are statutory courts and the salary arrangements and conditions seem within legislative control *if advisable.*

As to posting by the Clerk in the lobby—that practice, we understand, has been followed for years in the Boston Municipal Court each week so that all the judges can see where they stand. Comment is invited.

F. W. G.

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## WRITTEN NOTICE TO PUBLIC SERVICE CORPORATIONS OF INJURIES BY NEGLIGENCE

Another suggestion recently made to the Editor in conversation is submitted for public consideration as follows:

Section 18 of Chapter 84 relates to written notice of injuries sustained from defects in ways, to be given as a condition precedent to the right to maintain an action against the city, town or person upon whom the responsibility for maintenance is imposed. Section 89 of Chapter 161, relating to street railways, also requires written notice in advance of commencement of an action for injuries from negligence in the use or management of its tracks in public ways, to be given in accordance with the provisions of Section 18 of Chapter 84.

Logically, there seems to be no sound reason why the benefits of notice requirements under Chapter 161, now restricted to street railways, should not be extended to other forms of public utilities. A neighboring state has had in actual operation for many years a notice statute of the kind here suggested, and this has proved highly beneficial to the public generally. There, six

months was allowed, unless the action was begun within that period, in which event prior notice was dispensed with.

Would not a reasonable notice requirement in this commonwealth inure to the benefit of the public generally, as well as those public service corporations affected? Why should not such notice be given promptly as a condition prerequisite to the right to sue; suit to be brought within a reasonable time if the claim is not paid?

[*Editor's Note:*—Comment on this suggestion is invited.]

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## GRADUATED *AD DAMNUM* FEES ON CLAIMS ABOVE $3,000.00

The editor has also received the following suggestion:—the Judicial Council Reports, since their commencement in 1925, show that the subject of a jury fee and increased filing fee has been under periodic consideration. Several times the Judiciary Committee has reported bills for such fees, but they have been defeated. Perhaps it would meet with less opposition if an increase in fee were limited to cases in which the *ad damnum* in the writ exceeds $3,000, thus discouraging the use of extravagant or fanciful figures. Such figures are resorted to chiefly in jury-claim cases. Many instances are commonly known where the *ad damnum* has been increased, not once, but several times during the pendency of an action commensurate with the hopes or aspirations of the plaintiff on a medical build-up rather than the actual damage, or any change in the condition of the plaintiff, and solely, perhaps, to impress an auditor or jury. It is not desirable to encourage this practice, especially while courts are disposed to allow such motions as of course, and without inquiring too particularly into the reasons. In cases not really involving serious injuries, the attorney representing the plaintiff on some contingent basis would not be so likely to file such a motion when it involves the necessity of disbursement from his own pocket of a sum in addition to the original filing fee whenever the *ad damnum* is increased, or made to exceed, $3,000 in jury-claim cases.

The real purpose of the *ad damnum* in the writ is to secure a statement of an amount claimed having some reasonable relation to the actual facts relating to injury.

*EDITOR'S NOTE*

Discussion of this subject is invited. The spread between the amounts claimed in writs and the verdicts in all the cases in the Commonwealth in the years 1928–1929 appeared in the tables in the 4th and 5th Reports of the Judicial Council. Those tables show that at the time plaintiffs recovered in between 50% or 60% of the cases, but over 60% of the verdicts and findings where the plaintiff recovered anything were not in excess of $1,000. (See 5th Report, p. 12.) The 15th Report of the Council shows that, in the year ending June 30th, 1939, out of a total of 2,257 verdicts, 1,108 were for the plaintiff and 1,149 for the defendant, and in motor tort cases there were 696 verdicts for the plaintiff, of which 513 were for not more than $1,000. (See p. 62.)

F. W. G.

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## THE ANOMALOUS MASSACHUSETTS DOCTRINE THAT MOTOR CARS MISTAKENLY REGISTERED ARE "TRESPASSERS ON THE HIGHWAY"

To the Secretary of the Massachusetts Bar Association:

I beg to call to your attention the very peculiar Massachusetts rule that a motor vehicle with defective registration is a trespasser on the highway, first enunciated in the *Dudley** case, 202 Mass. 443 by a divided court. This doctrine, repudiated by every other court in the country except Massachusetts, has in the last thirty years caused untold injustice to both plaintiffs and defendants in motor vehicle accident cases. Its history and effect are well stated in a note in 46 *Harvard Law Review* 319, where it is described as "A Massachusetts Anomaly."

It appears quite likely from the record in the *Dudley* case and from what was said about it by Chief Justice Knowlton in *Bourne* v. *Whitman*, 209 Mass. 155, 172, that the *Dudley* case was a four to three decision with the Chief Justice in the minority. It might also be argued that the *Bourne* case is quite inconsistent with the *Dudley* case as an unlicensed driver is much nearer to negligent operation than an unregistered car, and that is, I am advised, the law of New Hampshire.

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* *Dudley* v. *Northampton St. Ry. Co.* (1909), 202 Mass. 443.

The doctrine has been softened in some respects by the Legislature, but that it is still a potent influence in this type of litigation is shown by the fact that since the last change in 1934, our court has handed down twenty-eight decisions on the subject of the effect of illegal registration on liability, five of these in 1940. There is no data available as to how many cases which did not reach the Supreme Judicial Court have been affected by this doctrine during the past five years, but there must have been many, judging from my own experience as auditor in these cases in Middlesex County.

Even the attempt of the Legislature to protect guests in an unregistered car is quite ineffective as the court in *Brennan* v. *Schuster,* 288 Mass. 311 holds that the plaintiff guest is barred if he knew all the facts from which flowed the legal conclusion that the operation of the motor vehicle was a violation of law.

This whole unfortunate situation should be cleared up, and it seems that the bar should take action to promote justice and improve the law. If I receive proper support, I am planning to file a petition with the Legislature for the enactment of the following bill:

> No violation of the laws governing registration of motor vehicles or trailers shall render any such vehicle, the owner or operator, or any occupant thereof, a trespasser upon the highway in respect to any civil rights or liabilities, but may be evidence of negligence only.

The passage of this bill would further the tendency towards uniformity in state laws, and make our Massachusetts rule coincide with that of every other state.

The whole doctrine of the *Dudley* case is, it seems to me, entirely illogical and I am hoping the bar can unite in an effort to wipe it out.

The substance of this letter has been sent to the officers of various bar associations in the Commonwealth.

27 State St., Boston. ARTHUR W. BLAKEMORE.

Mr. Blakemore has added to his letter the following:

MEMORANDUM

The doctrine is well settled that illegality which is a mere condition rather than a cause of an accident, cannot affect civil

liability. One of the early cases on this topic is *Kidder* v. *Dunstable* (11 Gray 342) holding that the failure of the plaintiff to carry sleigh bells as required by law was a bar only if his injury was caused by the absence of the bells.

*Newcomb* v. *Boston Protective Department* (146 Mass. 596) in an opinion by Judge Knowlton decided that the fact that the plaintiff's cab was not stopped lengthwise with the street and as near as possible to the curbstone is a bar to recovery only if the unlawful act contributed to cause the injury: that what is a contributing cause of an accident is usually a question for the jury to be determined by the facts of the particular case. The court points out that the mere fact that the cab would not have been struck if it had not been in the place where the blow came is a condition and not a cause of the impact.

The same distinction was pointed in *Moran* v. *Dickinson* (204 Mass. 559), where the plaintiff under sixteen years of age was attempting, contrary to law, to run a defective elevator. The court holds that such violation of law was merely a condition, or an attendant circumstance, of the injury.

Mr. Dooley forty years ago remarked that the Supreme Court followed the elections and it is obvious that any court must be somewhat influenced by public opinion at the time.

For example in 1812, New England, and especially Massachusetts, was bitterly opposed to the War with England, and our court held in 8 Mass. 549 that the commanders-in-chief of the militia of the several states had a right to determine whether any of the exigencies contemplated by the Constitution existed to require them to place the militia in the service of the United States. This curious decision was promptly reversed in *Martin* v. *Mott* (12 Wheat. 191). In 1845 the community feeling was overwhelmingly in favor of the strict observance of the Sabbath; and in *Bosworth* v. *Swansey* (10 Met. 363) the court, by Chief Justice Shaw, held that one traveling on Sunday could not recover for personal injuries; this result was not changed by the Legislature until 1884, when the community feeling toward Sunday observance became a little less rigid. In 1909 there was a great deal of community feeling against the automobile, and our court in the *Dudley* case again departed from the common law rule by holding that an unregistered automobile is a trespasser on the highway. The ground of the decision appears to be that the court "is dealing here with a peculiar kind of vehicle which

has only recently come into use" and which is frightening to horses. The rule in the *Dudley* case has been carried to the most absurd lengths, rendering a trespasser on the highway persons who are guilty of various innocent mistakes in registration, and even passengers have been considered involved in the illegality.

It seems fair to suggest that the court today would never write the decision in the *Dudley* case, both because the conditions have changed and motor vehicles are no longer a peculiar kind of vehicle frightening to horses, and because the court in numerous cases since the *Dudley* case has adhered to the well settled common law rule that breach of a criminal statute has no effect on civil liability unless the statute plainly so provides. In the recent case of *Richmond* v. *Warren Institution* (1940 A. S. 1973), the court remarks that a statute prohibiting leaving things on the stairs of an apartment house had no effect even as evidence of negligence where a bicycle is left on the stairs. The court remarks that there is in this commonwealth no doctrine of negligence *per se* whereby a violation of a penal statute is regarded as in itself a negligent act, and that violation of the statute furthermore had no effect as evidence of negligence.

It must not be forgotten that the registration statute in 1909 at the time of the decision in the *Dudley* case was a plain criminal statute with criminal penalties attached thereto, with no provision whatever bearing on civil liability.

I enclose a copy of my proposed amendment to the statute in its present form. This has the merit of simplicity and I believe that all questions of fraudulent representations, or failure to register, belong in the criminal law in view of the decision which I have cited in this memorandum.

### Draft Amendment

Chapter ninety of the General Laws is hereby amended by striking out that portion of section nine as amended beginning "but violation of this section shall not constitute a defence" and inserting in place thereof the following:—"No violation of the laws governing registration of motor vehicles or trailers shall affect any civil right or liability."

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*Editorial Note:* We are informed that the Council of the Middlesex Bar Association has voted to support a movement to change the rule in the *Dudley* case and that the Norfolk County Bar Association, at a meeting on December 4th, supported a change in principle and referred the matter to a committee for report.

We believe the "trespasser" doctrine operates as an unknown trap for many law-abiding citizens among the hundreds of thousands of registered car owners in Massachusetts and should be changed or abandoned. Every one knows that there are many slight errors that may be made in a hurry inadvertently by honest people. A deliberately crooked registration can be treated by the criminal courts; but for inadvertent mistakes, temporary suspension of the registration for a week on discovery of the mistake, by the registrar, would seem an adequate penalty, without bothering a court, instead of making a mountain out of a mole hill by the "trespasser" doctrine. We invite comment.

Is "laws governing registration" too general? Does it cover "display" in Section 6? Just how much does it mean? Should "Section 6 and this Section" be substituted? The latest amendment of Section 9 is St. 1934 C. 361. Should there be an exception of "deliberate intention to prevent identification"? Should not defective equipment under Section 7 be covered as negligence?

F. W. G.

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## THE BAR IS ON THE MARCH*

*By* GEORGE MAURICE MORRIS†

I would talk to you of October 20, 1914; the occasion is the Thirty-seventh Annual Meeting of the American Bar Association. Presiding is the chief executive of the American Bar Association, William Howard Taft.

He heralds the success with which the American Bar Association has waged its four-year fight against judicial recall movements.

He reports upon the earnest efforts of the Association's Committee to secure Uniform Procedure in Federal Courts under rules to be issued by the Supreme Court. He urges a continuance of the effort in the face of discouragement and develops the merits of the idea.

He then advocates an executive force under the direction of the Supreme Court, or of the Chief Justice, "to keep close and current watch upon the business awaiting dispatch in all the districts and circuits of the United States . . . to make periodical estimate of the number of judges needed in the various districts to dispose of such business, and to assign the adequate numbers of judges to the districts when needed."

*From an address delivered before the Federal Bar Association, October 17, 1940, *Federal Bar Association Journal*, November, 1940.

†Member of the bar of Illinois and the District of Columbia; formerly chairman of the House of Delegates, American Bar Association.

He says the burdens imposed upon the Supreme Court already weighted down with too much work could be met by taking away from that court all questions which do not involve the construction of the Constitution and by limiting the duty of the court to hear other cases, to those which, upon a writ of *certiorari*, the court in its discretion draws to its jurisdiction.

He concludes with an exhortation to the bar to remove the grounds for just criticism of our judicial system and so silence the agitation with reference to the courts, the general attacks upon them and "the resort of the demagogues to the unpopularity of courts as a means of promoting their own political fortunes. . . ."

May not we who sometimes despair of the acceptance of improvements in the administration of justice, in the light of the 25 years which have followed that address, pause and take heart? The American Bar Association and its president opposed the wild clamor for the recall of judicial opinions; the movement is dead. They promoted for years uniform procedure in civil proceedings in the Federal courts under rules to be promulgated by the Supreme Court; we now have that system. They proposed putting the administrative power over the Federal courts under the ægis of the Supreme Court; we have it. They proposed the grant of broad powers under the *certiorari* process to save the Supreme Court from collapsing under a staggering load; we have it!

Not the least of encouragements to those of us who sometimes falter in our confidence that meritorious projects will ultimately triumph, must be the realization that two of these great projects, namely, uniform procedure and administrative supervision of the Federal courts by the judiciary, are now a part of our system and were made so during the administration of a determined Attorney General of quite a different political faith from that of Mr. Taft.

On the evening of the first day of that 1914 meeting Mr. Taft introduces Elihu Root with a title that it has never been my privilege to hear given to any other living man. Mr. Taft's line is, "I introduce to you the leader of the American Bar — Elihu Root of New York."

Senator Root catalogs the uncomplimentary things being said of the administration of justice, the courts and the bar. His curative platform is still preached among us. He warns of the lawyers' conservatism, of their not naturally being reformers

and of their preoccupation with the cases in which they are engaged. He says that the most successful members of our profession are the most preoccupied with their clients' affairs and little inclined to change conditions under which they have prospered.

Specifically, the Senator says that the Bar can improve our law-making. We make too many laws. They are ill-considered, badly drawn, . . . causing ignorance and uncertainty regarding the law and creating questions which crowd the courts with new issues before the old questions can be decided. He mentions as mistaken the idea that "the people who would be most deeply affected by a law are disqualified as witnesses regarding its wisdom, practicability and effect, because of their interest. If they see that a law affecting them is proposed and undertake to say what they think about it, they are accused of lobbying and warned off the premises."

He advocates for each legislative body a drafting bureau and expert counsel to draft bills.

He goes to the simplification of procedure in our courts. He says that "A short and simple practice act in each jurisdiction laying down the general lines of procedure and leaving the rest to the courts is all that is necessary."

His next suggestion is that we must reform ourselves in our use of the rules of evidence. There are about twenty objections to the admission of evidence in a trial in an American court to one in an English court; this notwithstanding that the system is the same and the rules are the same in both systems.

. . . Expert drafting counsel are now the expected equipment of every legislature. The simplifying of court processes has made a noticeable advance in many jurisdictions and has received especial emphasis in the last two or three years. Pre-trial procedure, for instance, is "putting the parties heads together" on the real issues of a litigation in a most gratifying fashion. The American Law Institute is striding along on the new Evidence Code. So far as Mr. Root was specific, we have been on the move for a considerable period.

The final event is the banquet celebrating the 125th anniversary of the Supreme Court. Chief Justice White deplores the tendency to resort to the constitution as though it were but an instrument to limit true development instead of being, as he describes it, "the broad highway through which alone true progress may be enjoyed."

He deplores also the tendency to be "luke-warm concerning attacks upon fundamental and essential constitutional provisions and to take it for granted that they may not be overthrown."

We can not now be charged with indifference respecting the preservation of constitutional principles. If the good Chief Justice had only been with us the past few years he could hardly have complained of any "luke" in the warmth with which our profession has debated the "fundamental and essential constitutional provisions." Whatever we may lack, it is not heat.

Principally emphasized in this 1914 gathering was the duty of the bar as a social agent. The participants in this meeting gave the customary due compliments to the merits of our courts and the excellences of American lawyers but the stress was upon "Wake up. Get moving. That which we have left undone must be done."

With all our consciousness of the shortcomings of our own day and the meagerness of our accomplishment, happily we could say to the men of that day that we have begun to move. If group consciousness, to a degree never before present among the bar in this country, augurs anything we have the spirit of an army. If cooperative and nation-wide, all-year-round activity is significant we have mobilized. In fact, ladies and gentlemen, the Bar is on the march!

Over one-third of our states now have the integrated bar system to which every lawyer in the state must belong. In those states where the voluntary associations continue, the examples of these all-inclusive groups have furnished a stimulus to performance in keeping with profession which has been almost electric.

In the local field, city bar associations are thriving all over the country. No longer are they merely concerned with the maintenance of a library, disciplining their members and giving an annual dinner. They are potent factors in an ever widening circle of activities for the social betterment of the communities in which they function. Their number is constantly being added to and their influence is being multiplied. . . .

In 1914 the American Bar Association, after 36 years of existence, did not have 10,000 members. The membership was but 8 2/10 per cent of the bar of the United States. Now, the actual dues paying members of the Association total more than 32,000. True, this is only 18 per cent of the lawyers in the coun-

try, but that is but a part of the story. In the American Bar Association's House of Delegates of the Legal Profession sit the representatives of bar associations which include in their ranks an estimated 100,000 lawyers. This number is approximately two-thirds of the lawyers and judges of the country who are actively functioning in the profession to which they have been admitted.

In that House sit, *ex officio*, the Attorney General and the Solicitor General of the United States. In its five years of existence not only have some of the best-known lawyers of the country participated in its sessions, but there have appeared as members, governors of states, United States Senators and Representatives, United States Circuit and District Court judges, judges of the highest state courts and one present member of the Supreme Court. This House semi-annually gathers together as official representatives of the bar many of the most influential men in America.

In 1914 the work of the Association was done by 25 standing and special committees, 3 sections, 3 conferences, one "Bureau" and one so-called Institute. Possibly there were 50 or 60 committees in all. Today well over 700 committees carry on the work of the organization. . . .

All told, nearly 3,000 men and women are listed in the Association's official family. Some work: some don't. But I personally know many, many men whose time devoted to the discharge of their bar responsibilities will equal, or exceed, that spent upon their personal affairs, not to mention the sizeable contributions from their pockets for which the only reimbursement is the consciousness of a responsibility well met.

Speaking of money, for the fiscal year ending in 1914 the Association spent $40,210.19. Roy Vallance will tell you that the current annual expenses of the Association today will run between five and six times that amount. Sensible, meritorious projects wait launching at every hand only for a greater income.

But enough of figures. They might merely mean that many men and much money are traveling in circles without advancing. This is not the case. The record will speak for itself to anyone who cares to consult it.

The organized bar is bending its best energies to the improvement of the administration of justice for whatever interest the law touches. The militant preservation of the civil liberties of our citizenry, free legal service to the indigent and the under-

privileged, making more available professional aid to the man of limited means, ridding the bar of the unethical lawyer, improving the education of men who come to the bar to serve our people, are well defined, sought for and increasingly attained objectives.

We have, in addition, many objectives. . . . An example is the movement, started last month [September] to mobilize the bar for national defense. The swiftness with which that organization is being set up, the cooperation offered from all sides, . . . are almost breath-taking.

The bar has many critics in high and low places. It always has had critics and, I pray, always will have. Much, much remains to be done. Many things we would do may not be possible; we, of all men, work with, and within, the limitations of human nature. Individuals among us may not be in the rhythm but, as a whole, we are on the march.

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## IS PROVINCIALISM A CHARACTERISTIC OF THE PROFESSIONAL INTEREST OF THE BENCH AND BAR IN MASSACHUSETTS?

*(From the "Bar Bulletin" for November, 1940)*

What is said here is not to be taken too seriously, but the facts suggest the question.

In 1938, the American Bar Association medal for distinguished public professional service — a medal which had been awarded in succession to Samuel Williston, Elihu Root, Oliver Wendell Holmes, John H. Wigmore and George W. Wickersham, — was awarded to Herbert Harley, the founder of the American Judicature Society and the editor of its *Journal*. In presenting the medal, the President of the American Bar Association said of this society:

> "For twenty-one years, its *Journal* has been the chief instrumentality in America for improving the administration of justice. . . . There is not a state or important local bar association that has not felt the impress of its ideas."*

This *Journal*, during almost its entire existence, was, and still is, sent free to any member of the American bench and bar who asks for it. This fact, as well as the contents of the *Journal* itself, has been frequently referred to in various publications.

*The full tribute may be found in the *American Bar Association Journal* for September, 1938, p. 714.

All that is necessary is to write to The American Judicature Society, Ann Arbor, Michigan, and ask to be put on the mailing list. It is *not* necessary to join the Society and pay dues. Under these circumstances, one might, perhaps, expect that a large proportion of the bench and bar would take advantage of the opportunity to keep in touch with professional developments and experience all over the country, in order to understand better the discussion of our local problems and their possible solution.

We understand that at present there are approximately 9,000 judges and lawyers in the United States on the mailing list of the *Journal*. We have recently seen the list for Massachusetts showing about 275 names. This list contains the names of 4 out of 7 justices of the Supreme Judicial Court, 2 or 3 out of 32 justices of the Superior Court, 1 out of 3 judges of the Land Court, 2 or 3 out of 20 judges of the probate courts, 4 or 5 out of 72 district court judges, and 3 or 4 out of about 150 special justices of district courts, all the members of the Judicial Council, about 250 members of the bar, and none of the federal court judges.

Does the fact that so few Massachusetts judges have taken advantage of the opportunity to receive this *Journal,* which is short enough to be quickly examined, indicate a lack of interest in, as it seems to indicate a lack of familiarity with, the progress and methods of administration of justice elsewhere? Does the fact that only about 250 members of the bar, out of some 8,000 or more, have asked to receive the *Journal* in order to keep informed about their own profession, as well-equipped doctors keep informed, indicate a similar lack of interest at the bar? We think that the answer is not lack of interest, but mere habits of inertia.

We suggest that every reader of the BAR BULLETIN invest three cents in a postage stamp (or one cent in a post card) to ask for the *Journal*. If he does, he may find himself a better equipped lawyer or judge and be glad of his investment. We understand that the coming issues will contain articles on subjects likely to interest the profession in Massachusetts, including one on *Stare Decisis*.†

†The August number for 1940 contained articles on the "Federal Rules and *Erie Railroad Co.* v. *Tompkins*"; on judicial regulation of evidence; on certain aspects of the oaths of witnesses; on a suggestion of the London Chamber of Commerce that a certain practice in admiralty be used in motor tort cases, etc. The October number for 1940 contains a discussion of the Act of Congress to provide for rule-making in criminal procedure; impeaching one's own witness; a three judge court in Michigan; a reprint of Dean Wigmore's editorial of 1928 on the ultimate authority over procedure and "comity," etc. The December number contains an interesting article on judges and juries.

## "POLITICAL JUDGES"

*(From the "Bar Bulletin" for November, 1940)*

Under this title the following editorial appeared in the *Boston Post* of November 11, 1940:

> "The recent campaign revealed much activity on the part of certain judges.
>
> "Some of them, no doubt, were actuated by ambitions to go higher on the bench. It is natural for a jurist to want a better place and more money.
>
> "Others were drawn to participation by habit. They had to be politicians to get on the bench. They still are politicians, despite the traditions and implications of the bench.
>
> "In this campaign their work was mostly under cover. They wrote speeches and engaged in discussions of party strategy. This is well known to the public. It was not confined to one judge, or even several.
>
> "But the public takes a chary view of this sort of activity. The life tenure of judges, the general respectability of the bench and the inviolability of the courts, tend to make people annoyed when the story is related that judges are politically active, even to ghost-writing speeches.
>
> "The upshot of this will undeniably strengthen a movement for election of judges. The public wants something to say about political henchmen on the bench. And the only way it can have its say is by restriction of the appointive power of the Governor and the election of judges, particularly those in district courts. *However, we do not want this, so the judges had best keep out of politics.*"

To what extent and in which parties this took place we do not know, but all judges, and the thoughtful, public-spirited members of both parties, should remember the suggestion in the last sentence. Some years ago the editor of the BULLETIN was in New York City one week before election, about to cross Broadway at eight in the evening. Far down the street he heard a loud commotion, which he took to be the clang and roar of fire apparatus. The crowd surged back to the sidewalk, traffic was halted and along came a procession of automobiles, a dozen trucks and touring cars, filled with adults and children, blowing horns, exploding bombs, throwing confetti, shouting and cheering. Large banners on the cars bore the legend —

"VOTE FOR————————FOR JUDGE"

Dean Pound, who grew up and practised in a community where judges were elected, once told a legislative committee that the people of Massachusetts do not know what an elective judiciary means, and that "they ought to go down on their knees every day and thank God that they have not got one in Massachusetts." Not long ago some judge was quoted in the press, with headlines, doubtless unexpectedly, and, we hope, incorrectly, as saying that "a judge was *only* a man who knew a governor." If that sort of cynical remark, however true it may be in some instances, really represented the judicial standard of Massachusetts, our judicial history and reputation during the past one hundred and fifty years would have been quite different from what it has been. If anyone wishes an object lesson of an elective judiciary, we suggest that they read the story of the Detroit judicial election of 1935 as described by a Michigan editor in the "Annals of the American Academy of Political and Social Science" for September, 1935.* Cynicism has not been the dominant characteristic of judicial selection in Massachusetts.

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## "JUDGES AND CLERKS"

*(From the "Boston Post" of November 22, 1940)*

"The recent primary in Revere showed how important it is that political-minded judges be placed under some sort of restraint in their activities.

"A district court justice from western Massachusetts appeared at a rally to further the candidacy of one of the mayoral contestants.

"This was no compliment to the Revere voters. Surely they have the right to choose for themselves without help from the Connecticut Valley. But the justice, who has a reputation as an able and honorable man, was well within his rights to do what he did.

"Other judges and district court clerks have violated the spirit of their life-tenure jobs by interfering in elections. As the habit seems to be growing, there should be a method found for halting this.

"Such activity implies obligations, and it detracts from the inviolability and fairness of the courts.

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*Also reprinted in 20 *Mass. Law Quart.*, No. 4, p. 41.

THE MACHINERY OF JUSTICE IN ENGLAND. By Richard M. Jackson.* Cambridge: University Press. 1940. Pp. viii, 342.

(*From the Harvard Law Review for December, 1940, by permission*)

It is a noteworthy event in legal education that Mr. Jackson's volume has been placed on the reading list at the Cambridge Law School. For this is a book on the administration of justice in England that does more than provide a description of the organization and jurisdiction, civil and criminal, of the courts. It contains, in addition, chapters on the personnel of the law — barristers, solicitors, juries, judges, and clerks; on the cost of the law — the finances of the courts and the expense of litigation; on special tribunals — arbitrators and administrative bodies; and on the agencies and outlook for reform. The materials are drawn not merely from the blueprint of the statute book and rules of court, but from studies of the machinery of justice in operation: "Barrister," "Justice in England" (1938), Muir, "Justice in a Depressed Area" (1936), "Solicitor," "English Justice" (1932), Mullins, "In Search of Justice" (1931), and the reports of some thirty-odd Royal Commissions, all of them monuments to the spirit of self-searching.

While Mr. Jackson gives due attention to the work of the High Court in its several branches, consisting of about thirty judges (p. 30), his chief concern is not with the *elegantia juris*, but with the less ceremonious work of less exalted tribunals. "For most people," he writes, "'the law' means the police, the magistrates, and the County Court" (p. 129). Whether or not the statement is true of the popular conception of "the law," it is, without doubt, true of popular experience with the administration of the law. One and a quarter million civil proceedings, roughly, are commenced each year in the County Courts, of which thirty thousand are contested; in addition, over twenty thousand workmen's compensation cases annually come before these courts (pp. 28–29). On the criminal side, over half a million persons are summarily dealt with each year by the magistrates (p. 129).

In these realms of the administration of justice, the small part taken by juries and the great part taken by laymen are striking features. In 1936, there was jury trial in just seven cases tried in County Courts (p. 63); either party might have applied for

* Solicitor of the Supreme Court, Lecturer in Law in the University of Cambridge.

an ordinary or a special jury, the latter having higher property qualifications. Mr. Jackson offers in explanation of the waiver of this privilege in the County Courts a lack of faith in juries and the fact that a trial before a judge alone is cheaper and more expeditious. The criminal courts of summary jurisdiction, of which there are about a thousand, are presided over by some twenty-three thousand magistrates, most of them (outside of London) unpaid and untrained in the law (pp. 83, 130); it is not surprising that the need has been expressed for magistrates of fatherly rather than grandfatherly age; it is only noteworthy, perhaps, that it was Lord Hewart who expressed the need (p. 134). Summary trial before a magistrate, which may result in a sentence of as much as six months' imprisonment, or a fine of £100, or both, is generally chosen by the accused even where he has an election to be tried by a jury on indictment. In only about fifteen per cent of the indictable offenses is there trial by jury (p. 91). Mr. Jackson ascribes the waiver of jury trial to a better to-bear-those-ills-we-have philosophy on the part of criminal defendants; they prefer prompt and limited sentences by magistrates to the greater maximum sentences that are possible after trial by jury at assizes or quarter sessions. A reconstruction of the summary courts is suggested, by which each would be composed of a panel of compensated lawyers and laymen, sitting together.

If Mr. Jackson is doubtful of the virtues of trial by laymen, he is quick to defend what in other quarters has been known as trial by Whitehall. Writing of administrative tribunals, he observes: "The best cure for distrust of these tribunals is attendance before them, just as the best cure for complacency about magistrates is to appear before them." And this, written, it must be remembered, about the author's side of the Atlantic: "Antagonism to ministerial tribunals is sometimes no more than a hearty dislike of the law they are administering" (p. 294).

At many points, Mr. Jackson makes specific proposals that will be of interest to American lawyers. His advocacy of a Ministry of Justice may find support in the recent experience of New York and other states with that form of agency of law revision.* His proposals concerning costs are advanced with more trepidation. The suggestion is made that expenditures of a litigant be limited by a sliding scale, according to the nature of the case

* See Stone and Pettee, *Revision of Private Law* (1940) 54 Harv. L. Rev. 221, 229.

and the amount in controversy (p. 251). Mr. Jackson recognizes the traditional difficulties in the way of change, but regards the self-interest of the legal profession as an exaggerated obstacle; the existing situation regarding costs, he believes, is satisfactory to no one. What is needed, he maintains, is a spirit in legal education that will not regard the problems of administration of law as a "vulgar and irrelevant intrusion," and something of the historical sense that led Professor Winfield thus to describe a statute of 1731 providing that proceedings in court should be in English: "The nation at large needed it, some wise men predicted that it would ruin England, some still wiser men seized upon minor inconveniences that resulted from it as quite sufficient to damn it, and succeeding generations wondered why it had not been passed a century earlier" (p. 317).

In the struggle for the better administration of justice, the present volume is not merely a record, but, in a modest way, a weapon. If one objects that the military figure should be reserved for the all-consuming conflict now raging, let him deny that the matters of which Mr. Jackson writes are bound up in that conflict, in its resources as well as its goals. Now, least of all, need we make apology for saluting the Benthams and the Broughams who have appeared in each generation, and on both sides of the Atlantic.

PAUL A. FREUND.

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(*Note:* In the *North Carolina Law Review* for December, Professor Sunderland says of Jackson's book, "As a readable and scholarly account of the organization, personnel and operation of the English judicial system, this book is unsurpassed.")

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The Sixteenth Report of the Judicial Council is on the press and will be sent out in a Supplement to the "QUARTERLY" very soon.

## OUR FIRST AND LAST LINE OF DEFENSE

*The Spirit of Anonymous, or Unadvertised, Service*

The Unknown Airman's letter to his mother has been widely printed in the newspapers, but the following account of it deserves more publicity, even in a legal periodical, for the spirit of the "Unknown Airman" is needed, and exists, in the legal profession, as well as in other fields of activity. The story appeared in the book review section of the *New York Herald-Tribune* of December 15, 1940.*

> On the eighteenth of last June, as headlines were announcing the collapse of France, *The London Times* published on the editorial page what its leading article called "a document that may well become historical, a classic." Found among the belongings of a young R. A. F. pilot of a bombing squadron, it was a letter to his mother, to be sent to her after his death. Left open to show that no military intelligence was enclosed, the station commander found it "the most amazing one I have read: simple and direct in its wording but splendid and uplifting in its outlook." With the mother's permission he sent it to be shared "by the greatest possible number of our countrymen at home and abroad." Before the day was out a flood of requests for its reprint began; within the week it had been put into leaflet form; within the month many thousands had been sold and every mail was carrying the letter everywhere. Reread too often for leaflets to suffice, a slim volume now preserves it in England. This is the letter that now appears on this side of the ocean, between covers the color of a cloudless sky, stamped with the crowned wings of the R. A. F.
>
> It bears no author's name. That has never been given to the public. When the young airman's portrait, painted from his mother's photographs by Frank Salisbury, was unveiled in London on September 18, she was present, but her name was not called. "She desires," said the chairman, "to be known simply as the mother of the young unknown warrior." A savage air attack was going on as the meeting began. Just as the veil was withdrawn, a card was handed to the chairman. It read: "All clear."
>
> They say this war has brought out no young poets, as the first great conflict brought out Alan Seeger or Rupert Brooke. Young airmen live their poems today. Nothing they wrote in verse spoke so plainly to 1914 as this simple letter, with the self-forgetful beauty of a spirit come to terms with death, speaks to our present and our future.

To get the full significance of this story, and of the spirit of the mother and son, one should reread the first four verses of the sixth chapter of Matthew, and think about them.* The portrait by Salisbury appeared in the *Illustrated London News* of September 28, 1940.

F. W. G.

(*Note:* The novel "Dr. Hudson's Secret Journal" may also interest readers.)

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* An Airman's Letter to his mother. 16 pp. New York: E. P. Dutton and Company. $.50. Reviewed by May Lamberton Becker.

## KNOLLENBERG'S NEW BOOK ABOUT GEORGE WASHINGTON AND THE REVOLUTION.

In a private letter to Samuel Chase on June 14th, 1776, in the midst of the final struggle for the Declaration of Independence in the Continental Congress, John Adams wrote:

> ". . . If I were to tell you all that I think of all characters, I should appear so ill natured and censorious that I should detest myself. By my soul, I think very heinously, I cannot think of a better word, of some people. They think as badly of me, I suppose; and neither of us care a farthing for that. So the account is balanced, and perhaps, after all, both sides may be deceived, both may be very honest men." (Adams' Works, IX, 396.)

Recollection of this last sentence, which deserves to be remembered as a sidelight on Adams, was revived by reading Mr. Knollenberg's book, just published by the Macmillan Co., under the title, "Washington and the Revolution, A Reappraisal, Gates, Conway and the Continental Congress." In a statement quoted on the jacket, Allan Nevins, whose opinion is entitled to respect, calls it "one of the most important contributions to the history of the Revolution since Van Tyne's two volumes appeared in 1922." It is an interesting book. Mr. Knollenberg was a lawyer in active practice in New York before he became the librarian at Yale. His book is a brief for a more considerate and less abusive view of General Gates, General Conway and the members of the Continental Congress, than that presented by those historians who have accepted the estimates and very human prejudices of Washington in regard to them.

The story was told of Calvin Coolidge that when some book appeared which questioned the unqualified eulogies of Washington, a reporter called at the White House to ask what the President thought about it. After listening to the account of the book, President Coolidge looked out of the window and said, with characteristic brevity, "Well, the monument's still there." Mr. Knollenberg does not attempt to knock down the monument. On the contrary, he recognizes that Washington's "qualities of greatness tower above his limitations," and he assumes, probably more than he expresses, the fact that, whatever his faults, Washington's influence during the Revolution was, for that day, of the outstanding nature which may, perhaps, be realized by reference to the influence of Churchill in England during the

past eight months. In this sense, while, of course, there is no such thing as a one man war, or a one man revolution, Beveridge's statement, which Mr. Knollenberg calls "conventional," that "Washington was the revolution" may be justified. Some similar statement may be made about Lincoln as the great figure of the Northern cause in the crisis of the Civil War. But Mr. Knollenberg does not consider it fair "to maintain the tradition of the hero's nonexistent infallibility" by shifting "the responsibility for the consequences of his lapses to others, who are made the scapegoats of his mistakes."

Most of us have grown up with the idea that General Gates was a liability and that General Conway and members of the Continental Congress were mixed up in a discreditable political plot to thwart Washington known as the "Conway Cabal." This view dies hard and men are apt to cling to their aversions, especially in regard to General Gates. Mr. Knollenberg says, in his preface, that in the course of his work on a history of political developments of the Revolution

> ". . . it became evident that, from the time (July 1775) that Washington takes the center of the stage, the more widely read books on the Revolution give a distorted picture of some of these facts. This applies especially to the facts concerning the relations between Washington and the Continental Congress and General Gates and Conway. I found myself in a position similar to that of a lawyer forced to try a case before a judge, who, far from being prepared to take judicial notice that the sun rises in the east, or that six is less than eight, had been taught the opposite."

He then proceeds to try the case for Gates, Conway and the Congress, before the jury of his readers, on contemporary letters and diary entries, many of them hitherto unpublished. Without pretending to an authoritative knowledge of the period, but merely as one of the "run of the mill" readers, I think he proves his case for a "reappraisal," not so much of Washington, as of those whom Washington and many historians have condemned, although one still wonders about Gates. Every war has been full of mistakes under pressure, and, except for the purposes of hero worship, the reputation for infallibility is not a sound basis for respect. History and biography often need rewriting, if it can be done fairly, although the late William G. Sumner said somewhere that "absolute impartiality was probably a moral impossibility."

In "General Washington's Dilemma," published within a few years, Katherine Mayo has told a most dramatic story of one of Washington's mistakes of judgment under pressure, and its results, after Yorktown. Mr. Knollenberg does not pretend to be the first to attempt to "balance the account," as John Adams said in the letter quoted at the beginning of this note. Readers of Kenneth Roberts' "Rabble in Arms," will find in this book that there is another side to the picture of General Gates. The sidelights on Generals Schuyler, Lafayette, and others are also interesting. Of course, the problems of Congress were as difficult then on a smaller scale as they are today on a larger scale. The astonishing thing is that they "muddled through" at all.

The book does not go beyond the Revolution. It does not enter that difficult period of reconstruction when, whatever his faults, the figure of Washington towers into the position of "first in peace" during the constitutional development of the "United States." This was a period of the Revolution quite as important as the war because a reconstruction was the object of the war. I have always thought, perhaps to an exaggerated degree, that Washington's conduct as presiding officer of the Philadelphia Convention in 1787 was one of his greatest and most unique public services.

Readers of the book need not fear that an idol is shattered, or that a mistake was made when the Lincoln memorial was placed so that the figure of the man who saved the Union (but who also made mistakes) faces the monument to the man whose courage, balanced judgment, and influence brought it into being. The two great figures, who, on the whole, in spite of lapses, relegated the first person singular to the background, are fittingly commemorated in the national capital.

F. W. G.